Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P., TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION

July 14, 1993

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Summary of Argument

Time Warner Entertainment Company, L.P. ("TWE"), herein opposes certain petitions for reconsideration or clarification filed in the "program-access" rulemaking proceeding. TWE argues as follows:

- Under 47 C.F.R. § 76.1002(f), parties have 120 days to bring their contracts, including exclusive contracts, into compliance with § 628.

- The Commission lacks authority under § 628 to impose damages to aggrieved distributors for violations of the program access rules.

- The Commission should refrain from amending its rule implementing § 628(c)(2)(c) so as to prohibit exclusive agreements between programmers and multichannel video programming distributors other than cable operators.

- The Commission should not alter its conclusion that higher programming vendor costs are associated with HSD

Preliminary Statement

On April 30, 1993, the Commission released its First Report and Order ("the Order") in this rulemaking proceeding, promulgating rules implementing and interpreting § 19 of the Cable Television and Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"). See Cable Act of 1992--Program Distribution and Carriage Agreements,

Argument

I. THE 120-DAY PERIOD TO BRING CONTRACTS INTO COMPLIANCE WITH § 628 APPLIES TO ALL CONTRACTS, INCLUDING CONTRACTS WITH EXCLUSIVITY PROVISIONS.

WCA and WJB ask the Commission to "clarify" that exclusive contracts are prohibited as of July 16, 1993, the date on which the Commission's regulations implementing § 628 become effective. WCA 3; WJB 4. Both suggest that this "clarification" is necessary because programming vendors may conclude that they have 120 days (that is, until November 15, 1993) to bring their exclusive contracts into compliance. See, e.g., WJB 4 ("some vendors may seize upon the language in Paragraph 122 of the First Report and Order, which arguably provides a 120 day period for offenders to

The suggested "clarifications" are, in reality, a blatant attempt to rewrite the Commission's rule and should be denied. The Commission's rule provides:

> "All contracts, except those specified in paragraph (e) of this section, . . . must be brought into compliance with the requirements specified in this subpart no later than November 15, 1993".

§ 76.1002(f). The rule thus makes crystal clear that the 120-day period is available to bring contracts into

includes both the discrimination and the exclusivity rules. 4/

Moreover, even if the rule were somehow in need of "clarification" (which, as shown above, it is not, the rule being clear), the "clarification" suggested by WCA and WJB would make for bad policy. First, both the statute and the Commission's rules clearly envision that exclusive agreements that are in the public interest will survive; the suggestions of WCA and WJB either ignore that such agreements can be approved or that it takes time to obtain approval for such agreements. 5/ Second, there exists no policy reason to deny parties to exclusive agreements the same opportunity to bring their agreements into compliance as parties to discriminatory contracts. Third, parties to exclusive agreements may use the grace period to renegotiate these agreements and thus obviate the need for filing a petition for Commission approval.

WCA's alternative suggestion, that all petitions for Commission approval must be filed by July 16 [illegible]

untenable. In justifiable reliance upon the Commission's initial rule, parties to exclusive contracts expected that they would have until November 15 to bring exclusive contracts into compliance. It would be fundamentally unfair now to rule that the deadline for filing a petition for Commission approval has already elapsed.

II. DAMAGES SHOULD NOT BE AVAILABLE AS A SANCTION FOR VIOLATIONS OF § 628.

The NRTC argues that the Commission has authority under the 1992 Cable Act to award damages to aggrieved multichannel video programming providers for violations of the program-access regulations. NRTC 5. The NRTC is wrong. Section 628(e), entitled "Remedies for Violations", sets forth all remedies available for violations of this provision. Section 628(e)(1) provides the Commission with the power "to establish prices, terms and conditions of sale of programming", but does not say that damages are available. Section 628(e)(2) states that the remedies of § 628(e)(1) "are in addition to . . . the remedies available under title V" of the Communications Act, but the provisions of title V, 47 U.S.C. §§ 501-510, do not provide for damages. Those provisions provide the Commission with the

authority to impose penalties payable to the federal government--not to private parties. 6/

The NRTC contends, however, that "[w]ithout the possibility of an appropriate award of damages . . . [t]he Program Access rules will lack the regulatory 'teeth' necessary" and that, without damages, programmers will be allowed "to continue [their] discriminatory practices with impunity". NRTC 7, 8. This contention simply misses the mark. As discussed above, the Commission has authority to impose penalties under title V of the Communications Act. In addition, the statute allows the Commission to establish the terms and conditions by which a programmer should be

III. THE COMMISSION SHOULD NOT EXTEND THE PROSCRIPTIONS OF § 628(c)(2)(C) TO ENTITIES OTHER THAN CABLE OPERATORS.

Section 628(c)(2)(C) requires the Commission to:

> "prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any [vertically integrated programmer] for distribution to persons in areas not served by a cable operator as of the date of enactment of this section".

Pursuant to this provision, the Commission promulgated a rule that applies only to cable operators. See § 76.1002(c)(1). The NRTC argues that the Commission has unduly limited the scope of § 628(c)(2)(C) and that exclusive agreements between programming vendors and multichannel video programming distributors other than cable operators should also be regulated.

The Commission should reject the NRTC's argument. First, § 628(c)(2)(C) does not require the Commission to adopt the rule suggested by the NRTC. Rather, it requires the Commission to prohibit only those exclusive agreements to which cable operators were a party. Second, there is nothing in either the congressional record or the record before the Commission indicating that contracts with distributors other than cable operators should be covered by a per se rule. TWE submits that it would be unwise to

regulate such contracts unless experience has first taught that such contracts inhibit competition. 7/ Third, far from leaving (as the NRTC contends) "a massive regulatory 'loophole'", NRTC 13, the failure to establish an outright ban of such contracts does not leave the Commission powerless. Pursuant to § 628(b) and § 76.1003, any multichannel video programming distributor believed to be aggrieved by a programmer's conduct can bring a complaint for violations of these provisions. Fourth, if and when experience in the complaint process under § 628(b) teaches that exclusive agreements with distributors other than cable operators should be regulated, there will be time enough to amend the rules, and promulgate the rule that NRTC now prematurely seeks.

IV. THE COMMISSION HAS NOT INCORRECTLY PREJUDGED THE HIGHER COSTS INVOLVED IN SUPPLYING PROGRAMMING TO HSD DISTRIBUTORS.

In the Order, the Commission stated that it agreed with commenters indicating that providing programming services to HSD distributors "may be more costly than service to others using different delivery systems . . . as additional costs are often incurred for advertising

expenses, copyright fees, customer service, DBS Authorization Center charges and signal security". Order ¶ 106. The Commission termed such cost differences "particularly evident" for those HSD distributors who do not provide a complete distribution path to individual subscribers. Id.

The NRTC faults the Commission for "pre-judg[ing]" these issues and attempts to minimize such costs as "tier bits" at the DBS Authorization Center and activation data links, both requisites for HSD distribution. NRTC 17, 18. The NRTC conveniently fails to discuss several other factors, including those recognized by the Commission, which contribute to the higher costs associated with HSD distribution. For example, TWE documented in its opening comments in this rulemaking proceeding that HSDs increased the risk of piracy and thus increased the need for programming vendors to scramble their signal. TWE 25. Further, a programming vendor must provide a range of

Commission on this point seems trivial: Whether a particular HSD distributor has higher (or lower) costs associated with its distribution is a question that will be resolved during the complaint process.

Conclusion

For the foregoing reasons, the Petitions for Reconsideration or Clarification filed by WJB, WCA and NRTC should be denied.

July 14, 1993

Respectfully submitted,

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